BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY ROUSH Claimant VS. **RENT-A-CENTER, INC.** Respondent AND **HARTFORD INS. CO. OF THE MIDWEST** Insurance Carrier	)	Docket No. 1,062,983

ORDER

STATEMENT OF THE CASE

Respondent and insurance carrier (respondent) requested review of the February 14, 2013, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. William Phalen, of Pittsburgh, Kansas, appeared for claimant. Brandon A. Lawson, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant's injuries were suffered as a result of concurrent risks, *i.e.*, personal health conditions and employment risk of driving a vehicle. Accordingly, the ALJ ordered respondent to provide claimant with a list of two physicians from which to choose an authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 13, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's injuries did not arise out of and in the course of her employment but rather arose out of a personal health condition. Respondent argues the ALJ's decision finding it responsible for claimant's medical treatment fails to consider the 2011 amendments to the Kansas Workers Compensation Act (Act).

Claimant contends there is no evidence that her personal health condition caused the accident. Claimant further argues that in the event respondent's version of the facts are believed and she fell asleep, her claim is still compensable as her personal risk was concurrent with a work-related risk under the 2011 amendments to the Act.

The issue for the Board's review is: Did claimant's injuries arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant was employed by respondent full-time as a customer account representative, which included such duties as contacting customers, moving furniture to and from homes, moving furniture between stores, and rearranging furniture in the company store. The position required claimant to perform many different activities, including lifting objects and driving company vehicles. Claimant testified that respondent was aware of her sleep apnea but asked her to drive the company vehicles regardless.

On October 20, 2012, claimant was driving a company vehicle on Highway 47 from Chanute, Kansas, to Pittsburg, Kansas, to pick up merchandise for respondent. Highway 47 is a two-lane highway with no shoulder in the area the accident occurred. Claimant either lost concentration or fell asleep and drove off of the road into a ditch where the vehicle continued for another half mile before stopping. The vehicle did not strike anything during the accident.

Medical records from the date of the accident indicate that claimant told both paramedics at the scene and emergency room personnel that she had fallen asleep and driven off the road. Previous medical records also indicate that claimant has fallen asleep at the wheel prior to October 2012. However, claimant testified that on October 20, 2012, she lost concentration and veered off the road directly into the ditch. Claimant contends that she did not fall completely asleep. Claimant suffered injuries to her neck and back in the accident.

Claimant was compliant with her medications at the time of the accident. She was taking multiple medications for various afflictions, including two medications for sleep apnea. Claimant testified that she used a machine at night for her sleep apnea and that she used it the night before the accident. Claimant stated she is prescribed a medication in the morning that makes her alert, and she took this medication the morning of her accident.

Claimant was referred to Dr. Edward J. Prostic by her counsel on December 12, 2012, for her continuing neck and back pain. Dr. Prostic recommended claimant receive physical therapy for her neck and back and suggested that she may return to light duty employment after several weeks of treatment. Dr. Prostic further stated that "the work-related accident sustained October 20, 2012 while working for [respondent] is the

prevailing factor in causing the injury, the medical condition and the need for medical treatment."[1] Claimant remains off work since her accident.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508(d)

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

[1] P.H. Trans., Ex. 1 at 3.

ANALYSIS

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. [Citation omitted.] But where an injury results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed.[2]

This quote from *Bennett* appears to be and is argued by claimant to be the basis for a finding that even though the accident was directly or indirectly caused by claimant losing concentration or falling asleep, the claim is compensable because the claimant's work at the time of the injury, *i.e.*, driving the truck, caused her to be at an increased risk.

The Court of Appeals in *Bennett* applied K.S.A.1991 Supp. 44-501(a). The 2011 amendments to the workers compensation act specifically added exclusions for accidents arising out of personal risks and idiopathic causes. Neither K.S.A.1991 Supp. 44-501(a) nor K.S.A. 1991 Supp. 44-508(d) contained any language directed toward personal risks or idiopathic cause.

Claimant's description of the injury is that she lost concentration and veered off the road. There is evidence that claimant suffered from and was being treated for sleep apnea. The ambulance attendant record indicates claimant fell asleep while driving. The initial emergency room notes state that claimant fell asleep and drove into a ditch. The Girard Medical Center records also contain a history of claimant falling asleep at the wheel. There are references in the Community Mental Health Center records to whether claimant suffers from sleep apnea or narcolepsy. However, there is no absolute diagnosis of narcolepsy by a physician. The claimant was taking medication for sleep apnea. This Board member finds there is insufficient evidence in the record to find that claimant's accident was related to narcolepsy or sleep apnea.

This Board member finds that claimant's losing concentration or falling asleep while driving does not constitute a personal risk or an idiopathic cause within the meaning of K.S.A. 2012 Supp. 44-508(d). Losing concentration while driving or driving without the benefit of enough sleep is a risk common to and distinctly associated with all employments that require employees to drive vehicles.

CONCLUSION

Based upon the foregoing, this Board member finds that claimant suffered an accidental injury arising out of and in the course of her employment with respondent.

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[2] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated February 14, 2013 is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: William Phalen, Attorney for Claimant
wlp@wlphalen.com

Brandon Lawson, Attorney for Respondent and its Insurance Carrier
blawson@evans-dixon.com

Bruce E. Moore, Administrative Law Judge

[3] K.S.A. 2012 Supp. 44-534a(a)(2); see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).